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August 30, 2010

Via Email

U.S. Department of Labor
Email Address: e-ORI@dol.gov

Re: Regulations Issued under ERISA Section 408(b)(2)

Dear Department of Labor:

Please consider the following comments with respect to the ERISA section 408(b)(2) regulations now in the process of being finalized.

The $1,000 exemption does not consider relativity. While a $1,000 expense would be material to a plan with $100,000 of assets, it would not be material to a plan with $1 billion of assets. Basing the exemption on a percentage of assets would be more logical.

The regulations would be better placed under ERISA section 404. Paying no more than reasonable fees for services is a part of a fiduciary's duty to act prudently. Such regulations could provide numerous means of acting prudently with respect to purchases. Examples could be provided that include situations where the buyer sought and received specific fee quotes with breakdowns and situations where breakdowns were not received. Receiving a breakdown is not necessarily required for a purchase to be prudent. Also, instead of regulations, informal guidance could be provided.

Because the statute relied upon to issue the regulations, ERISA section 505, relates solely to Title I of ERISA, there is a very significant possibility the regulations are interpretive in nature with respect to Internal Revenue Code (IRC) section 4975. Under IRC section 4975(f)(4), with respect to a service, the "amount involved" is the excessive compensation amount. If there is no excessive compensation (i.e. compensation in excess of reasonable compensation), there can be no amount involved. Without an amount involved, there is no basis for the excise tax. You may also wish to consider the following authorities: *Zabolotny v. Commissioner*, 97 T.C. 385, *aff'd in part, rev'd in part*, 7 F.3d 774 (8th Cir. 1993); ERISA §§ 502(i) and 502(l); 29 CFR §2560.502i-1; and 26 CFR §53.4941(e)-1(b).

Much of what the regulations are attempting to accomplish has already been accomplished. Citing a Hewitt Associates report apparently relating to 2003, the 2004 ERISA Advisory Council Report of the Working Group on Plan Fees and Reporting on Form 5500 (cited in the preamble) provides: ". . . the vast majority of plan sponsors have not calculated and do not know the actual cost of running the plan." In contrast, the 2008 Deloitte Survey (cited in the preamble) received the following answers to the following question: Do you agree with the following statements? We have performed a detailed fee analysis and have a thorough understanding of all plan expenses: Agree—64%; Disagree—12%; No opinion—24%. In the 2009 Deloitte Survey, the "agree" percentage had increased to 68%. Also, on page 30 of the 2009 Deloitte Survey, the following sentence exists: "The majority of employers agree that fees paid to administer plans are competitive (86%) and they do not have difficulty obtaining the basis for such fees (79%)." So, much of the objective of the disclosure requirements has been accomplished, making the disclosure requirements unnecessary. Also noted in the Deloitte surveys is the fact that most fees are paid by employers, not by participants.

Finally, it is more likely than not the regulations are unlawful. Authorities to consider include: 5 U.S.C. §706; *Bowen v. American Hospital Association*, 476 U.S. 610, 106 S. Ct. 2101 (1986); *MCI Telecommunications Corp. v. American Telephone, Telegraph Co.*, 512 U.S. 218, 114 S. Ct. 2223 (1994); *U.S. Department of Labor v. United Steelworkers of America*, 494 U.S. 26, 110 S. Ct. 929 (1990); *Sullivan v. Zelby*, 493 U.S. 521, 110 S. Ct. 885 (1990); *Chamber of Commerce of U.S. v. Securities and Exchange Commission*, 412 F. 3d 133 (D.C. Cir. 2005); *Waterkeeper Alliance, Inc. v. U.S. Environmental Protection Agency*, 399 F.3d 486 (2nd Cir. 2005); and *American Federation of Labor and Congress of Industrialized Organizations v. Chao*, 409 F.3d 377 (D.C. Cir. 2005).

Thank you.

Sincerely,

Allen Buckley